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ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East. District. *July* 1815.

MITCHEL vs. M'MILLAN.

EASTERN DISTRICT. JULY TERM, 1815.

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Foreign proceedings in bankruptcy, no protection against debts contracted here

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THE answer admits the debt stated, but avers that on the days of the dates of the first and last items of the account and during the whole intermediate time, the defendant was a copartner in trade, with James Sloan, of Liverpool, in Great Britain, and established at Charleston, S. C. as a branch of the house of Sloane & M'Millan, of Liverpool, as the plaintiff at the time well knew; and that afterwards, viz. about nine months after

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the date of the last item, in said account current, the partnership still subsisting, a commission of bankruptcy was awarded, according to the laws of England, against the defendant as a merchant, shop-keeper and dealer, in Liverpool aforesaid, and sixty days after the issuing of said commission, he obtained his discharge or certificate in due form.

THE plaintiff demurred, and the defendant having joined in demurrer, the District Court gave judgment for the defendant and the plaintiff appealed.

THE question for the solution of this Court is this:

Is a certificate of bankruptcy, duly obtained in England, where, it is admitted, it works a complete discharge of antecedent debts, a bar to a suit brought in this State, by a person residing in the United States, and for a debt contracted there before the bankruptcy?

THE affirmative is supported on the ground, that the laws of commerce are a branch of the laws of nations; commerce being carried on amongst mankind for their common benefit: hence wherever the property of an insolvent debtor may be found, it becomes, it is said, the common pledge of all his creditors, whether natives

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or aliens: amidst the wreck of his fortune, all his creditors must fare alike; bankruptcies, therefore, and consequently all questions concerning the condition of the bankrupt are to be determined by the laws and customs of the country, where the bankruptcy was *declared*: the legal forms of that country alone are to be pursued and exclusively adopted, and all the creditors must submit to all the conditions prescribed by the *lex loci*, in the same manner, as all the creditors of a succession are bound to the magistracy of the place where it is *opened*. The discharge which ensues is said to be legal, irrevocable and entire, and to preserve these characteristics, even in foreign countries, with respect to creditors who reside there. A maxim of the laws of nations is invoked, according to which, all judgments and acts of the civil power, altho' emanating from a foreign authority, are to be respected and binding in every country; states owing this deference respectively to each other as to the laws which they have made in their own territories, and as to the application which they have made of them to individuals living under their dominion: neither reason nor political convenience permitting that a man, who is absolved in one place, should be reputed guilty in another, nor that a debtor, liberated by the laws and the tribunals of the place, where he had his domicil, should again remain a debtor, and liable to process if he should happen to remove to ano-

ther place, thereafter. *Cooper's B. L. App.* 29, 32.

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SUCH are said to be the leading principles of the laws of France, on the subject of bankruptcy. They were recognized by the Supreme Court of Pennsylvania, in the case of Millar *vs.* Hall, in 1788, 1 *Dallas*, 228. "It is true, says C. J. M'Kean," "though the laws of a particular country have *in* "*themselves* no extraterritorial force, no coercive "operation, yet by the consent of nations, they "acquire an influence and obligation, and in many "instances become conclusive throughout the "world. Acts of pardon, marriage and divorce "made in one country are received as binding in all "countries." He held that the insolvent law of a neighbouring state should enjoy that weight in the courts of Pennsylvania, which it naturally derived from general conveniency, expediency, justice and humanity; "for mutual conveniency," added he, "policy, the consent of nations and the "general principles of justice form a code which "prevades all nations and must be every where "acknowledged and pursued."

LIVINGSTON, J. in the case of *Van Raup* vs. *Arsdale*, 3 *Caines* 154, expressed his *private* opinion (though he concurred with an opposite *judicial* one) that a *cessio bonorum*, under the laws of a State in which the debtor had his *permanent* re-

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sidence ought to operate as his discharge, from his creditors in every part of the world.

THIS subject is, however considered, in a very different and quite opposite point of view in the courts of Great Britain, in a case, which is said to have settled the law on this question, *Smith* vs. *Buckanan & al.* 1 *East*, 10 : the Court of King's Bench there holding that a discharge in Maryland was no exoneration from a British debt contracted prior to the bankruptcy. Lord Keny. on saying " it is impossible to assert that a con-
" tract made in one country is to be governed by
" the laws of another. It might as well be con-
" tended that if the State of Maryland had enacted
" that no debts due from its own subjects, to the
" subjects of England, should be paid, the plain-
" tiff should have been bound by it. This is the
" case of a contract lawfully made by a subject,
" in this country, which he applies to a court
" here to inforce : and the only answer is, that a
" law has been made in a foreign country, to dis-
" charge these defendants from their debts, on
" condition of their having relinquished all their
" property to their creditors. But, how is that
" an answer to a subject of this country, suing
" on a lawful contract made here ? How can it
" be pretended that he is bound by a condition to
" which he has given no assent, either express or
" implied ?

It is not easy to arrive at a clear understanding of this branch of the law, without a close examination of the manner in which it has been expounded by courts of justice abroad and in these states. And as the certificate in the present suit was obtained in Great Britain, it will be peculiarly useful to examine what is the effect of a discharge under the bankrupt laws in that country.

It seems that it once was a point admitted (and the idea does not appear to have as yet been exploded) that the bankrupt laws of Great Britain had no effect out of the isle. Lord Talbot and Lord Mansfield were of this opinion: a certificate, under a commission in England will not bar a debt contracted in the British West Indies, where there are separate laws and judicatures, *Waring* vs. *Knight*, *Cook's B. L.* 373. *Id.* 522, *Beawes's Lex. Merc.* 543. It has been determined in a case from Virginia, that the English bankrupt laws do not extend to the plantations, *Cleve* vs. *Mills*, *Cook's B. L.* 370, and in *James & al.* vs. *Allen*, 1 *Dallas* 188, Ch. J. Shippen said "the bankrupt laws of England were never "supposed to extend here (Pennsylvania) so as "to exempt the persons of bankrupts from being "arrested."

In 1779, Lord Mansfield held that if a bankrupt has money due to him *out of England*, as in St. Kitts or Gibraltar, the bankrupt laws so far

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vest the debts due him, in his assignees, that the debtors in these places shall not turn them round by saying they are accountable to the bankrupt; but, if before the bankruptcy the money be *bona fide* attached in those places, the asssignees shall not recover the debt.

TOWARDS the middle of the last century (1744) in the case *ex parte Burton*, 1 *Atkins* 255, which was that of a debt contracted before the debtor's *cessio bonorum*, in Holland, Lord Hardwicke observed that the cession, in the country in which it was made, discharged the person, but not the future property of the debtor. This has been considered as implying the opinion of the Chancellor to be, that if it had discharged the future property also, the decision would have been a different one, and consequently the bankrupt law of Holland would have been taken as the guide of the court. This reasoning is far from being conclusive.

IN the case of *Ballantine* vs. *Golding*, in M. , cited in *Cook's B. L.* Lord Mansfield is said to have holden as a general principle that "where "there is a discharge by the law in one country it "will be a discharge in another." But, as in weighing the decision of courts, we much rather attend to what is *done*, than to what is *said*, we cannot conclude that his lordship admitted this principle *lato sensu*: for this is quite inconsistent with his decision, in the case of *Waring* vs.

Knight, already cited, in which he held a discharge in England not to be any in the West Indies. In considering the facts of this case (*Ballantine* vs. *Golding*) we find all that it was necessary, and therefore all that it was intended, to decide, is that a discharge in the country where the debtor resides, *contracts the debt* and is discharged, is a discharge elsewhere. Golding resided, contracted the debt and was discharged in Ireland. In the case of *Quin* vs. *Keefe*, 2 *H. Bl.* 553, the court noticed the difference between a certificate granted out of the country, in which the debt was created and one granted in that country, and refused relief on a motion to discharge the bail: it appeared that the debt had been contracted in England and the certificate obtained in Ireland; and the same consideration likely induced the judgment of the court in the case of *Smith* vs. *Buckman & al.* already cited, in which the debt was contracted in England and the certificate obtained in Maryland.

From a view of the English authorities it follows that the tribunals of that country, do not allow the discharge of a bankrupt, obtained abroad, to bar a debt created in England towards a British subject.

We cannot find that there ever was a decision of the Supreme Court of the United States on the question under consideration. It was twice sent

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up for final determination, in that tribunal. In the one case, the cause went off on another ground *Emery* vs. *Greenwood*, 3 *Dallas* 369: in the other, the Court was of opinion that the question was informally presented. *Dewhart* vs. *Coulthall*, *id.* 409.

In the Circuit Courts of the United States, it appears to have been thrice determined. In Massachusetts District, in *Emery* vs. *Greenwood*, 3 *Dallas* 369, the parties were both citizens of that district, and the debt had been contracted there: the defendant afterwards removed his domicil to Philadelphia, where he obtained a legal discharge: being afterwards occasionally in Boston, he was sued for the old debt and pleaded his Pennsylvania discharge: the Court, presided by Iredell, J. circumscribed the operation of the discharge to the State, in which it was given. A different decision is said to have taken place in the Rhode-Island district, the Court being presided by Wilson, J. *id. in notis.* In the Pennsylvania district, the Court presided by Washington, J. supported the opinion of Iredell, J. saying that a defendant claiming a discharge under a certificate of bankruptcy, obtained in a foreign country, should shew, that the debt was created there. *Green* vs. *Sarmiento*: there is not any report of this case: it is cited from *Cooper's Justinian*, 628.

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In the State of Massachusetts, a discharge, under the insolvent laws of another State, has often been holden to afford no protection against a prior debt contracted in the former State. In the case of *Proctor* vs. *Moore*, 1 *Mass. T. R.* 198, the defendant having his domicil in Connecticut, being occasionally in Massachusetts, gave his note to the plaintiff, and returning home was afterwards discharged by the legislature of Connecticut. Being now sued in Massachusetts, he sought to avail himself of the discharge, but the Court held his plea bad, as it did not shew that the contract was made, and the plaintiff resided, in Connecticut, for unless he was an inhabitant of Connecticut, at the time of the contract, the proceedings of the legislature could not bind him: which the Court added they had repeatedly decided.

The question has met with the same determination in the State of New-York. In the case of *Smith* vs. *Smith*, 2 *Johnson*, 235, the defendant, an inhabitant of Rhode-Island, being on a visit, in Massachusetts, had given his note to the plaintiff, and returning home had taken the benefit of the insolvent laws of Rhode-Island. He was sued in New-York, and the Court held that the discharge could be no bar, out of the State of Rhode-Island. The student will notice this as a much stronger case than any that have been cited. Hitherto we have seen courts protecting their own citizens or

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persons trading or residing in the State, against discharges obtained abroad ; here is a court exclusively confining the operation of bankrupt laws to the country in which they were enacted : even when the creditors did not give credit, or resided in the State.

In the case of *Van Raugh* vs. *Arsdale*, 3 *Caines* 154, the Court said " the insolvent laws of " another State, cannot take away the rights of a " citizen of this State to sue here, upon a contract " made here, and which is binding by our laws."

The first adjudication that is recorded, as having taken place in Pennsylvania, on the subject under consideration, is to be found in the case of *James & al.* vs. *Allen*, Chief Justice Shippen, declared it to be the opinion of the Court, that insolvent laws had never been considered as binding, out of the State, that made them. 1 *Dallas* 191.

Shortly after, was decided the case of *Millar* vs. *Hall*, 1 *Dallas* 128, cited in the beginning of this opinion. The defendant resided in Baltimore and was discharged from his debts, under the laws of Maryland. He had received the money, which was the ground of the debt, in Baltimore; but the agreement, under which he had received it took place in Pennsylvania, where the plaintiff had his domicil, and where the suit was brought, and it was holden that his certificate protected him,

This decision is apparently at variance with that given in the preceding one, but only apparently so. The law of Maryland according to the first, is not binding out of that State: in the latter case, the decision is that the law of Maryland is binding upon the debt created there, and justly destroys it, *eodem modo quo construitur, destruitur.* It arose and was dissolved under one law, and being dissolved by the law under which it was created, it must be recognised every where else as rightfully dissolved. It is true, in delivering the opinion of the Court, C. J. M'Kean used a different, but not an opposite or contrary reasoning. But in the decisions of courts we should rather attend to what is *done* by the Court, than to what is *said* by the organ, through which this judgment is conveyed.

In the case of *Thompson* vs. *Young*, 1 *Dallas* 394, and *Donaldson* vs. *Chamberlain*, 2 *Dallas* 100, the defendants being residents of Maryland, and having taken the benefit of the insolvent laws of that State, where protected by the courts of Pennsylvania. In the first case the debt was created in Maryland, as appears from the report and we conjecture that this was the case in the other, as the Court grounded their decision on the authority of *Millar* vs. *Hall*, from which it is probable the case was a parallel one.

In the case of *Haines* vs. *Mandeville*, 2 *Dallas* 256, both parties were British, and the debt creat-

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ed and the certificate obtained, in the common country and the defendant was protected by the courts of Pennsylvania; and under similar circumstances, the parties being French, the defendant was likewise protected in that State, in the case of *Leclerq* vs. *Rouchette*, cited 1 *Dallas* 256.

From a review of these American cases, and they are all those to which we have been able to recur, it appears that relief has ever been extended to bankrupts, who had been discharged in the country in which the debt was created, no instance occur in which it was denied. In one case only, *Proctor vs. Moore*, the Court appears to have expected, as an additional requisite, that the plaintiff should also have at the time of the contract his domicil, in the country in which the debt was created.

Comparing the American with British cases we find no difference in the general conclusion, except in some early decisions, holding the bankrupt laws not to extend to the West-Indies or the American provinces. The courts in England, have, however, so far taken notice of the bankrupt laws of other countries, as to consider the assignment of bankrupts' effects in other countries, altho' in fact made *in invitum*, and consequently allow assignees, deriving their titles under foreign ordinances, to sue in England, for debts due to their bankrupts' estates, *Hunt* vs. *Potts*, 4 *T. R.* 182.

192. We find it no where adjudged, that a certificate obtained out of the country, where the debt was created, afforded any protection out of the country in which the discharge was obtained. In Terrasson's case, on which Mr. Duponceau has favoured the American jurists with the opinion of learned counsel in Paris, we are not satisfied from the statement of facts, that the lawyers consulted intended that what they said should be construed to extend to debts contracted out of Pennsylvania; although it must be admitted that the general way in which they argue leads to that conclusion. *Cooper's B. L. App.*

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We cannot find that in any case, either in England or the United States, persons not domiciliated in the country, in which the certificate was obtained, were bound by the discharge, when the debt was not contracted there. The authority of no adjudged case would support us in solving the question under consideration in the affirmative.

Let us now examine the question according to the ideas of the Civil or the Roman law writers.

They all admit, that all business and transactions in court and out of court, whether testamentary or other conveyance or acts, which are regularly done, according to the laws of the place in which they take place, are valid, also in other

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countries, even where a different law prevails and where had they been so transacted they would not have been valid.

THIS principle, however, must be admitted with some caution.

IN testamentary cases, it is also true that the laws of the country where the succession is opened will be binding throughout the world i. e. that if the executor, administrator or curator, dispose of the assets according to the law of the country, he will be protected, even from the claims of creditors residing abroad. But this is only an elucidation of the principle we have deduced from the British and American cases, viz. that the *lex loci* of the contract must regulate it throughout the world. If A. contracts with B. in London and B. dies in Paris, where C. proves the will and has letters testamentary, A's. claim rests on an express contract with B. in London and an implied one with C. in Paris; for C. in taking up the execution of the will and possessing himself with the estate of A. became bound to pay his debts, according to the laws of France: on which the law raises an implied promise to each creditor to pay him what is due to him, according to the *lex loci* of both places respectively; but the mode of payment, the order of precedence, the time, must be regulated in all cases according to the *lex loci* of the country in which letters testamentary are granted.

In the same manner would be regulated the rights of the creditors of a bankrupt, *against* the syndics, assignees or trustees of the estate. For the obligation of the syndics, &c. which is the correlative of the *rights* of each creditor, is produced by the implied contract, resulting from the acceptance of the office or trust. In considering therefore the original claim of each creditor on the debtor, the law of the place where the contract took place must be the rule; but in considering the mode of payment, the precedence, the proportion and time of payment, the law of the place where the bankruptcy was opened must prevail, because it is the *lex loci*, the law of the place where the syndics, &c. contracted the obligation to manage the estate.

Proceedings in cases of bankruptcies may well be likened to proceedings on successions. Bankruptcies being successions in cases of commercial or civil death; but the resemblance stops there, the consequences as to the person or future property of the bankrupt or debtor cannot be explained by any thing in the case of a succession, which is that in which the original debtor has ceased to exist both civilly and naturally.

That the law of the country where the debt was created must govern the case in the country where the discharge was obtained cannot be denied. The moral obligation becomes a legal one, that is, receives its binding force in *foro legis* from the

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lex loci, which *eodem modo quo construitur eodem modo destruitur*. The *lex loci* is then that which the parties considered as that which was to enforce the obligation of the contract; it is one to which they gave their assent, they must take it for better and for worse.

But to consider the law of the domicil of the debtor, to be changed at his pleasure, as that which is to govern the case, from the circumstance that the bankruptcy was declared there, and thus to allow one party to chuse the law by which the rights of his creditors are to be regulated, would be manifestly unjust. The debtor might seek some remote corner of the world where one tenth of his creditors, and perhaps one single creditor, might dictate the terms of the discharge. Hence, whatever may have been said, *arguendo*, by any judge or counsel, we find no case in which a judge decided that the law of the place, where the bankruptcy was declared, is to be regarded out of it, when that country was not at the same time, that in which the debt was contracted, or the joint domicil of both parties, or when the creditor was not an actual party to the proceedings.

In most countries, the bankrupt law is meant to protect the honest, but unfortunate debtor, in the acquisition of future property for his own benefit. Humanity would seem to claim that the laws of all commercial countries should be ancil-

lary to each other and that the benign intention of the laws of the country, in which a certificate of discharge is obtained, should not be defeated by the tribunals of other countries in which the person or future property of a discharged bankrupt may afterwards happen to be found. But creditors have also rights, which humanity cannot disregard and which legislatures and courts of justice must protect.

If it were possible that an universal code of commerce could be devised, by which the proceedings, which precede the issuing of a certificate of bankruptcy, should be so regulated as to allow to present and absent creditors an equal opportunity of having their claims attended to and to contest the pretentions of the debtor to his discharge, then could it be with propriety contended that proceedings in case of bankruptcy ought to have the same effect throughout the world, and equally bind the most distant as the next door creditor. But, alas! very little reflexion must bring the conviction that this is an Utopian scheme. Commerce now embraces the four parts of the world: How is notice to be conveyed to merchants scattered over the surface of the globe? What length of time must elapse, if the opportunity is afforded, as justice requires, to each creditor to establish his right, take notice of, contest and disprove the allegations of the debtor? Will not the necessary delay defeat the object in view?

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How many creditors must prefer the abandonment of their rights, rather than incur the trouble, vexation and expense attending the assertion of them! If an universal legislature is required to frame this universal law, how are we sure that any thing short of an universal judiciary will prevent partiality in the execution of it?

BUT, it is asked, shall the unfortunate debtor be ever without relief, shall he pine and languish in misery as long as he lives? The claim of misfortune to ease its burden on the shoulders even of the fortunate must be sparingly enforced. Humanity can require no more for the bankrupt, than that, in the country in which he has asserted his claim to relief, and against those to whom he has afforded an opportunity to contest it, his person and future property should be protected. Perhaps it is inexpedient that this protection should extend to a wider circle. It will, in most cases, afford to the exertions of honest industry a scope ample enough to insure to the honest debtor and his family, a decent support. If the means of launching into more extensive speculations are lost to him, his misfortune will, in some degree, compensate the damage his creditors have sustained, as his example will restrain others from rash enterprises.

UNTIL now, we have considered all bankrupts as persons merely unfortunate, not tainted with fraud, nor chargeable with any indiscretion.

The law, however, presumes fraud in all cases of bankruptcy. That of Spain has a particular provision on this respect. *Menendez* vs. *Larionda's Syndics, post* 705.

THAT of France for along time subjected persons, who ceded their goods to their creditors, to ignominy; in some provinces they were compelled to wear a green cap. Fraud being legally presumed in a bankrupt, the greater part of insolvent are fraudulent debtors: out of those free from fraud, the greater number is perhaps chargeable with rashness and indiscretion. While the law, therefore, cannot extend its benign influence to both creditors and debtors, we cannot wonder that it should deny it to those among whom the fraudulent, the rash, and the indiscreet constitute a majority.

FROM the best consideration we are able to give to the question under examination we must solve it in the negative, and declare our opinion that a certificate of bankruptcy obtained abroad cannot protect in this State the person or future property of the debtor, against a claim of a citizen of the U. States, for a debt contracted in the U. States.

THIS abstract proposition extends itself with more force to the present case, as the certificate was obtained in England, where the tribunals avowedly deny to bankrupts, discharged in other countries, any protection against the claims of

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British creditors, for debts contracted in Great Britain. For, from this circumstance, we must conclude, that the law being thus settled there, little care is taken in proceedings on a bankruptcy to protect the interest of absent creditors. Indeed, in the present case evidence is spread on the record that the proceedings ripened into a discharge in the short space of sixty days; a time too short for American creditors to have received notice and attended.

A CIRCUMSTANCE has been noticed by the Court, from which the defendant meant to place his case in a different point of view, than the one in which the Court think they must consider it. It is stated that the defendant, at the time of the contract, and in the knowledge of the plaintiff, was a partner of Sloane of Liverpool, and kept a branch of the house of Sloane & M'Millan, in Charleston, S. C. from which the inference is intended to be drawn that the debt was created with a British house, and, therefore, with a reference to British laws. In other words, that the defendant, at the time the debt was created, had his domicil in Liverpool, when he kept a trading house in Charleston, S. C. and that as the certificate was obtained in the country in which the debtor had a domicil when he contracted the debt, the debt must be dissolved by the effect of the certificate. The partners of a mercantile house have each his

respective domicil, where they respectively dwell. Otherwise a man might have his domicil where he never sat his foot. But, admitting the domicil of the defendant to have been in Liverpool, still he must fail according to the decisions in *Proctor* vs. *Moore* and *Smith* vs. *Smith*.

THE District Court, in the judgment of this Court, erred in sustaining the defendant's plea: its judgment must, therefore, be reversed and annulled,

AND this Court, for the reasons aforesaid, doth adjudge and decree that the plaintiff do recover the sum acknowledged by the defendant to be due and claimed in the petition, with interest from the date of the first process and costs.

EMMERSON vs. *GRAY & TAYLOR*.

If A. buys goods for B., giving his own note, and draws on B., who pays the draft, the goods cannot, on the failure of A., be arrested in the hands of another agent of B.

MARTIN, J. delivered the opinion of the Court. This suit originated by a writ of sequestration obtained by Emmerson on thirty-two bales of cotton, by him sold to J. F. Gray and Jno. Taylor, of New-Orleans, on a credit of sixty days, for which he took their note: they having failed about nine days after the sale.

GRAY and TAYLOR, of Philadelphia, intervened claiming the cotton as their property; their claim being resisted by Emmerson, the issue was tried

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by a jury and there was a verdict and judgment for Emmerson. Gray and Taylor appealed.

THE statement of facts, after admitting the sale and failure as above stated, sets forth:

THAT one of the firm of Gray and Taylor came to New-Orleans, some time before the purchase of the cotton, and having determined to put a stop to the unlimited drafts of J. F. Gray and Jno. Taylor on Gray & Taylor, resolved not to accept any of them, beyond the amount of any quantity of produce which J. F. Gray and J. Taylor should place in the hands of an agent of Gray and Taylor; accordingly Bell, a person who had been a clerk of J. F. Gray and J. Taylor for about two years before, was so at the time and continued so till their failure, was chosen for this purpose. He received from Gray and Taylor the keys of two ware-houses, which were rented by J. F. Gray and J. Taylor and by them underlet to Gray and Taylor, and was informed that J. F. Gray and J. Taylor were to buy a quantity of cotton for the account of Gray and Taylor, which they were directed to lodge in Bell's hands. Orders were given to Bell to place all such cottons in the ware-houses aforesaid, giving a receipt therefore to J. F. Gray and J. Taylor and ship it, and when the ware-houses were emptied to return the keys to J. F. Gray and J. Taylor, and either draw on Gray and Taylor

for the rent, or desire J. F. Gray and J. Taylor to debit Gray and Taylor for it.

Soon after this J. F. Gray and J. Taylor delivered to Bell a parcel of cotton (other than that which is the subject of the present suit) took his receipt as agent of Gray and Taylor, and drew a bill for the amount on Gray and Taylor. The bill reaching the drawees by mail, before Bell's receipt, acknowledging he was in possession of the cotton, they refused to accept; but the receipt arriving next mail, the bill was accepted and paid at maturity.

The thirty-two bales, now in dispute, were next purchased by J. F. Gray and J. Taylor, from Emmerson, on a credit of 60 days and their note given accordingly, they then placed eighteen of these bales in the hands of Bell, for the account of Gray and Taylor, taking his receipt therefore, made a draft on Gray and Taylor, which they used in their own affairs, and which reaching the drawees, after the receipt of Bell, was duly honored.

J. F. Gray and J. Taylor, were in failing circumstances for about three years before their failure, which was not occasioned by any loss, within that time. Bell had access to their letters, books and papers. To his knowledge, his agency for Gray and Taylor was not known in New-Orleans out of the house of J. F. Gray and J. Taylor; but Gray and Taylor had not requested that it might be kept secret.

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J. F. GRAY and J. TAYLOR, during the agency of Bell, bought other produce for Gray and Taylor, but nothing purchased during that time, went to the discharge of any debt due by J. F. Gray and J. Taylor to Gray and Taylor. These transactions being kept perfectly distinct from all others.

THERE was some produce of J. F. Gray and J. Taylor in the ware-houses by them underlet to Gray and Taylor.

J. F. GRAY and J. TAYLOR failing, before the note given to Emmerson for the cotton became due, he sequestered the cotton, exercising his *droit de suite*.

GRAY and TAYLOR intervened claiming it as their property, denying the right of Emmerson to arrest it, as it was no longer in the possession of his vendee, and as they had acquired a fair title thereto by receiving a delivery of and paying for it.

THE only question for the determination of this Court is whether the transaction on the part of Gray and Taylor be attended with fraud, as the property sequestered had actually passed out of the possession of the vendees.

EMMERSON's counsel believe they discover it in the double capacity of Bell, in this transaction. He was at the same time the clerk of J. F. Gray and J. Taylor and the agent of Gray and Taylor.

We are of opinion that this circumstance may be sufficient to awake our suspicion and to excite our enquiry; but when we compare it with those which precede, attend and follow, it does not appear that it ought to have any influence on our decision.

We notice the absence (as far as the facts stated go) of any circumstance from which any collusion between J. F. and J. Taylor and Gray and Taylor might be inferred. That the real object of Gray and Taylor in appointing Bell their agent was to remove the produce for which they were to pay, from the control of J. F. Gray and J. Taylor, is manifested by their refusal to honor their bill, while the evidence of the delivery of the cotton remains behind, and the ready honor they do the bill as soon as the evidence is received. Hence the appointment of Bell, as an agent of Gray and Taylor, appears to us a correct transaction.

Let us now examine the transaction which has given rise to the present dispute.

We have seen that when the partner of Gray and Taylor was here, he mentioned to Bell his directions to J. F. Gray and J. Taylor; we now see the latter accordingly make a purchase; when that is done in the words of the statement of facts "they (the bales) were weighed" placed in the deponent's (Bell's) hands, and by him "stored." He gave his receipt, engaging to hold and deliver

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them to the order of Gray and Taylor. Seeing this receipt, the latter accept a bill and finally pay for the cotton. We see nothing that authorises us to call this a fraudulent purchase.

The counsel of Emmerson contends that admitting the fairness of the purchase, still he has his *droit de suite*, because the cotton lies still in the possession of his vendees.

In the possession of the vendees, 1. because J. F. Gray and J. Taylor pay rent to the proprietors of the ware-houses in which the cotton is found.

2. Because it is under their control, being under that of their clerk.

3. Because the cotton being bought of him for the account of Gray and Taylor, they are his vendees.

I. Although the underletting of the ware-houses of J. F. Gray and J. Taylor was not publicly known, it does not appear that there was any intention to keep it concealed: and the cotton being stored in their ware-houses is not a circumstance that may have tended to deceive Emmerson. Since it was previous to his parting with the cotton. If Gray and Taylor have voluntarily, and with the view to induce persons to trust J. F. Gray and J. Taylor, filled ware-houses, apparently occupied by the latter, with produce and

thereby aided them in obtaining a credit, which they otherwise could not have had, those who may thereby be injured may offer this circumstance, as a reason why they should be paid out of these goods, with a success of which we are not now to decide. But Emmerson may not say that this circumstance produced any injury to him, the cause cannot be posterior to the effect.

II. It does not follow that was is under the control of the clerk is necessarily under that of his employers. The conduct of Gray and Taylor manifests their opinion that produce in the hands of Bell was safer than in those of J. F. Gray and J. Taylor, for they refuse to pay for cotton till they hear of its passage from the hands of the latter into those of the former.

III. Although the cotton was purchased for Gray and Taylor, they were not the vendees of Emmerson; J. F. Gray and J. Taylor did not bind them by the contract. Emmerson took the notes of J. F. Gray and J. Taylor; the liability of Gray and Taylor was never to begin till after their agent had actually produce in his hands; and then they were to accept and pay drafts to the amount.

Upon the whole, no fraud, in our opinion, can be attributed to Gray and Taylor from any circumstance before us. If they lessened the stock

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from which the creditors of J. F. Gray and Jno. Taylor were to be paid by withdrawing from it the cotton, they increased it by accepting and paying drafts to the amount of its value. This transaction was not disadvantageous to the mass of creditors.

If by this transaction they have furnished to J. F. Gray and J. Taylor the means of destroying the lien of Emmerson on the cotton; they have enabled them to do what was lawful to be done; what Emmerson does not appear to have cared to prevent. What without the aid of Gray and Taylor, might have likely been effected without difficulty.

J. F. GRAY and J. TAYLOR are not even charged with having embezzled the proceeds of the bill; the counsel of Emmerson, in argument, advances it went to satisfy more pressing creditors.

WERE we to give judgment against Gray and Taylor, the estate of J. F. Gray and J. Taylor would be enriched by the value of the cotton to the detriment of Gray and Taylor. *Neminem oportet cum alterius detrimento locupletari.*

If Emmerson does suffer; he suffers because he has *trusted*, he is the victim of his confidence. Gray and Taylor gave no credit; they therefore ought not to lose.

The judgment of the District Court is, therefore, annulled and reversed, and this Court orders and decrees that the appellants Gray and Taylor recover the eighteen bales of cotton, found in the hands of Bell their agent, and that the appellee deliver the same, and pay all costs.

MENENDEZ vs. *LARIONDA'S SYNDICS.*

The creditor of a bankrupt, on a note, may establish his claim by other proof than that of the consideration given for it.

MATHEWS, J. delivered the opinion of the Court. In this case the appellant, opposes the homologation of a tableau of distribution, offered by the appellees, as syndics of the estate of Larionda, an insolvent debtor, because they refuse to place him on said tableau, as a creditor of the insolvent for the amount of $ 2,132 which he claims on a promissory note given by said Larionda.

ON the bilan of the insolvent, he is placed amongst the creditors, by receipts and accounts, for the same sum, which he claims by a note of hand. This circumstance amounts to nothing more than a confession, on the part of Larionda, that he owed to him the sum thus stated, at the time of his failure, but does not, legally, preclude the mass of the creditors from contesting the fairness and legitimacy of his claim. This they have done in the present case by the answer of the Syndics, to the opposition made by the appellant as above stated; in which they declare the

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promissory note, offered as evidence of the debt due to him by the insolvent, to be fraudulent and fictitious, and that the appellee never gave any consideration for it.

IT is unnecessary here to notice the circumstance of the note being lost, and the numerous exceptions heretofore taken in the cause, to the opinion of the Judge of the inferior court in relation to the evidence necessary, to establish its existence and amount; by the decision of this Court the cause was remanded for further trial, *ante* 256. On this trial, it appears from the record, that the counsel for the appellant relying on the evidence which he had offered to the jury, the counsel for the appellees moved the Court to instruct the jury that it was incumbent on the appellant in the Court below to prove the consideration of the note mentioned, before he could recover thereon against the Syndics, and the Judge having given an opinion to the jury as required, this opinion is excepted to by the counsel for the appellant, and on this exception alone the case comes before this Court.

THERE is no statement of facts; and the record contains nothing by which it appears, what was the amount of the testimony given by the appellant. Yet we are required to decide on the correctness or incorrectness of the opinion del-

fered by the Judge below, to the jury, as if the note had been fully proven and substantiated. Let us then consider the case, as if the note had never been lost, and was fully proven to have been given by the insolvent.

In cases of insolvency and *cessio bonorum*, it is lawful for the creditors to dispute amongst themselves not only the preference in the payment of their credits, but also the legitimacy of their claims; and when the latter occurs, the acknowledgment of an instrument in writing, and confession of a debt on the part of the insolvent is proof sufficient to establish the debt as against him but not against the rest of the creditors, for it is presumed to be fictitious and false, and made with a deliberate intention, to elude their right. And although it should appear by a note of hand, it does not prove its legitimacy, because of the facility with which it may be antidated, to the prejudice of other creditors: and for this reason *he who does not prove his credit by other means*, ought not to be considered amongst the true and lawful creditors; much less can any confession of the insolvent, after the cession of his property, affect the interest of his creditors, for then he is not at liberty to confess debts or acknowledge writings under private signature [*See Febrera del Juicio de Concurso, no.* 33.] The same principles are laid down in the *Curia Philipica, Tit. Conocimiento*, 111. *no.* 9. In this last author it

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is also recognized as a principle of law that in all cases of failures fraud is to be presumed. [*See lib.* 2. *Comercio Terest.* 11. *Falidos no.* 16.

FROM these authorities, we deem it correct to lay down the following, as legal axioms; 1st. in all cases of bankruptcy fraud is to be presumed on the part of the bankrupt; and 2d. when the truth and legality of the claim of any creditor of the bankrupt or insolvent is disputed by the other creditors, the confession of the debt by him or his acknowledgment of any instrument under his private signature, is not sufficient to establish the truth and justice of such claim against the other creditors; but on the contrary, he is bound to support the fairness and validity of his credit in some other way, or by some additional proof.

WE will consider the present case as one in which the mass of the creditors of Larionda, a bankrupt, are contending against the truth and legality of the claim of the appellant, as a creditor of the said Larionda. To support this claim or credit he gives in evidence a note of hand of the insolvent. This is not sufficient against the other creditors to prove its legality and justice; he must give faith to it by some other or additional means. In what other way he is bound to make out his claim or what other proofs ought to suffice in such a case, we do not find sufficiently laid down in any author. It certainly is just and reasonable to allow a person thus situated to do

away the presumption of fraud which goes to destroy his credit, by any legal evidence in his power, which might convince the minds of a court or jury of the fairness and justice of his claim; such as proving the consideration for which the note was given, as required by the Judge of the Court below in the present case, or it might be in his power to shew that the note was given at a period when no suspicion of fraud could possibly attach to the transaction, by proving the real time when it was given, without respect to the date it purports to bear on the face of it.

It is urged by the counsel for the appellant that a decision in this case, requiring proof of the consideration of the note, the subject of dispute between the present parties, will tend to establish the very inconvenient doctrine of requiring holders of promissory notes, in all cases, to prove their validity by shewing the considerations, for which they were obtained. As to this, it is sufficient to observe, that any principle, which may be herein settled, will be applicable only to cases similar in their circumstances.

As it appears, from the opinion of the Parish Judge and exception to it, that the appellant was required absolutely to prove the consideration of the note, and not offered the alternative of proving any other circumstance, which might have been sufficient to convince the minds of the court and jury, of the truth and legality of his claim: such,

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for example, as shewing the note to have been executed at a time which ought to destroy all presumptions of fraud in the transaction: and as it is the opinion of this Court that the Judge below erred in confining the appellant to the proof of the consideration of the note alone,

IT is, therefore, ordered, adjudged and decreed, that the judgment rendered in the inferior Court be reversed and annulled. And it is further ordered, &c. that the cause be sent back to the Parish Court to be there again tried, with instructions to the Judge to admit the appellant to the legal proof of any circumstance, which may shew the truth and justice of his claim against the appellees.

POLICE JURY OF N. ORLEANS vs. *MAYOR, &c.*

The jury of police of the parish, and the city council of New-Orleans have both the right of establishing a ferry across the Mississippi, before the city.

DERBIGNY, J. delivered the opinion of the Court. In this case the Jury of Police of New-Orleans complain of having been disturbed by the Corporation of the city, in the enjoyment of a right which they exercised under the laws of the state of causing a public ferry to be kept at the place called the powder-house, opposite to the city, and pray to be quieted in that enjoyment. The Corporation, without denying the fact, assert that they are authorised by law to oppose the establishment and landing of a ferry under the autho-

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rity of the plaintiffs, within the limits of the city.

The question then is, not whether both parties have a right to establish ferries within their respective limits: but simply whether the appellants can prevent the appellees from continuing to cause a ferry to be kept opposite to the city.

By a law enacted in 1805, provision was made for the establishment of ferries in the different counties of the territory; and to that effect the county judge was authorised to grant *as many* licenses as he should in his discretion think fit. At the same time, it was provided that when any water, over which a ferry should be erected, should divide two counties, the license obtained in either should be sufficient to enable the licensed person to transport persons or goods to and from either side of such water. And to secure to such licensed persons the profit arising from the establishment of such ferries, it was further provided that, within the distance of one league from them, no other individual should be suffered to transport, for profit or hire, goods or persons across the waters over which they should be kept. When the territory was afterwards divided into parishes, instead of counties, those regulations of course became applicable to the parishes.

Under that law, and ever since then, the parish of New-Orleans caused a ferry to be kept at the place commonly called the powder-house; and

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until the year 1813, enjoyed that right without disturbance.

At the beginning of that year a law was enacted entitled "an act further defining the organisation, authority and functions of police juries," by which the establishment of ferries, heretofore left to the parish judge, was made a part of the functions of those juries; and as by one of the provisions of that act, the city of New-Orleans was severed from the rest of the parish, *quoad* the administration therein attributed to the police juries, and directed to exercise within its limits the functions committed to those juries, the appellees seem from thence to have taken it for granted that they alone had a right to establish ferries to cross the river opposite to the city, and by their interference prevented the parish jury of New-Orleans from farming out to the highest bidder the powder-house ferry.

In that opposition we think they were not supported by the law. According to the spirit and even to the latter of the act of 1805, each parish administration may establish within its limits *as many ferries as they please*; and the ferrymen thus established have a right to transport goods and persons to and from both sides of the water, whether the opposite side belongs to an other parish or not; and that they must also have of course the right of a free landing on such opposite shore needs hardly be noticed.

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The parish of New-Orleans and the city certainly stand here in the same relation as two parishes divided by a river. Each has the same rights; and each is equally bound not to disturb the other in the exercise of those rights.

It is, therefore, adjudged and decreed that the judgment of the District Court be affirmed with costs.